



Humanitarian Engagement Under Counter Terrorism: a conflict of norms and the emerging policy landscape

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Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape

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Abstract

This article identifies two countervailing sets of norms – one promoting humanitarian engagement with non-state armed groups (NSAGs) in armed conflict in order to protect populations in need, and the other prohibiting such engagement with listed ‘terrorist’ groups in order to protect security – and discusses how this conflict of norms might affect the capacity of humanitarian organizations to deliver life-saving assistance in areas under the control of one of these groups. Rooted in international humanitarian law (IHL), the first set of norms provides a basis for humanitarian

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engagement with NSAGs in non-international armed conflict for the purpose of assisting populations under their control and promoting compliance with the rules of IHL. The second set of rules attempts to curtail financial and other forms of material support, including technical training and co-ordination, to listed ‘terrorist’ organizations, some of which may qualify as NSAGs under IHL. The article highlights counter-terrorism regulations developed by the United States and the United Nations Security Council, though other states and multilateral bodies have similar regulations. The article concludes by sketching ways in which humanitarian organizations might respond to the identified tensions.

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‘Material support’ is a valuable resource by definition. Such support frees up other resources within the [terrorist] organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks.¹ (Chief Justice Roberts)

In recent months, many working in the humanitarian profession have contemplated the image of an aid worker standing before a criminal court, accused of providing support for terrorism while conducting legitimate humanitarian activities. This article explores how that image came about, and how life-saving and impartial humanitarian assistance may be legally construed as providing unlawful benefits to non-state armed groups (NSAGs)² listed as ‘terrorist’ organizations.

Humanitarian assistance delivered in times of armed conflict and its corollary – the autonomous negotiation between independent humanitarian organizations and *all* parties to conflict – have often come under pressure from security and political demands. International humanitarian law (IHL) has sought to balance the security interests of the parties to an armed conflict with the humanitarian interest of ensuring that life-saving goods and services reach civilians and others *hors de combat* even in the midst of fighting.³

For the past decade, a quiet development has altered this balance. The promulgation by states of domestic criminal laws prohibiting material support to listed terrorist entities, and multilateral laws and policies creating a corresponding global counter-terrorism regime, present serious but little-discussed concerns for those engaged in the provision of life-saving humanitarian assistance in armed

1 Chief Justice Roberts, United States Supreme Court, writing on behalf of the majority, *US Supreme Court, Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (internal citations omitted).

2 This article uses the term ‘non-state armed groups’ as a general reference for non-state entities that engage in hostilities or that perpetrate acts of terrorism (or both). The use of this term is not meant to qualify the legal status of any of the non-state entities identified in this article. Acts of terrorism can be perpetrated during an armed conflict or outside of an armed conflict. This article does not take a position on whether any specific ‘terrorist’ group (as designated by states or multilateral bodies in their counter-terrorism regulations) constitutes an organized armed group for purposes of IHL.

3 See, e.g., Geneva Convention III (GC III), Art. 9; Geneva Convention IV (GC IV), Arts. 10 and 23; Additional Protocol I (AP I), Art. 70; Additional Protocol II (AP II), Art. 18.

conflicts involving certain NSAGs. The interaction between long-standing norms of IHL providing modest but clear protection for the work of impartial, independent humanitarian organizations and these domestic laws, donor policies, and multilateral norms is yet to be fully understood. This article seeks to explore contradictions between various state commitments, and to reflect briefly on the potential responses of the humanitarian community to the dilemmas posed by the counter-terrorism framework.

This article proceeds in three sections. The first section provides an overview of IHL provisions pertaining to humanitarian engagement in situations of non-international armed conflict (NIAC). In addition to laying out the IHL terrain regulating humanitarian engagement with NSAGs, this section outlines relevant developments in international law and multilateral policy building upon IHL and strengthening humanitarian claims for access and autonomous negotiation with NSAGs for the purpose of assisting and protecting vulnerable populations. The second section discusses recent developments concerning material-support-of-terrorism laws in the United States, particularly the recent case of *Holder v. Humanitarian Law Project* (*Holder v. HLP*).⁴ In addition, this section explores US administrative laws and donor policies imposing counter-terrorism-based restrictions on various forms of support to listed terrorist groups or individuals. It draws connections between US material-support laws and several key UN Security Council resolutions on global counter-terrorism. The final main section provides an explanatory framework for understanding what might motivate governments to take contradictory approaches to humanitarian engagement with NSAGs, and then sketches a number of possible ways in which the humanitarian community might respond to the legal and policy tensions discussed in the article. The conclusion highlights the fact that, despite this tension, neither the humanitarian imperative of assisting populations in need of life-saving relief nor the security imperative of preventing resources to be unduly transferred to listed 'terrorist' organizations will be going away any time soon. Beyond the conceptual nature of this tension, states in a dialogue with humanitarian organizations might attempt to establish procedures, principles, and practices that would facilitate co-ordinated planning and execution of humanitarian operations in these situations.

International humanitarian law bases for humanitarian engagement with non-state armed groups

This section sketches the mission of humanitarian organizations and how IHL provides clear, although limited, bases for such organizations to engage with NSAGs in NIAC. It aims to outline the set of norms underlying humanitarian engagement with NSAGs so that those norms may be juxtaposed

4 US Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

with the counter-terrorism-based laws and policies explored in detail in the second section. In outlining the bases for humanitarian engagement with NSAGs under broadly accepted interpretations of IHL, this section does not enter into the discussion on the status and content of a ‘right’ (if any) to provide or receive humanitarian assistance in armed conflict.⁵

The mission of humanitarian organizations

The core and distinctive mission of humanitarian organizations is to provide life-saving assistance to populations in need in times of armed conflict. To deliver this assistance, humanitarian organizations must, operationally and under law, seek the consent of the relevant party or parties.⁶ Practically speaking, in a NIAC where a population is under the control of an NSAG, humanitarian organizations must negotiate their access with the NSAG and, in most cases, seek the NSAG’s co-operation in order to ensure the safety and integrity of an organization’s operations. While by definition the purpose of humanitarian assistance is limited to provide life-saving relief for the population, NSAGs may derive direct or indirect benefits from this interaction.

- 5 See, e.g., Heike Speiker, ‘The right to give and receive humanitarian assistance’, in Hans-Joachim Heintze and Andrej Zwitter (eds), *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism*, Springer-Verlag, Berlin, 2011, pp. 7–18; Yoram Dinstein, ‘The right to humanitarian assistance’, in *Naval War College Review*, Vol. 53, No. 4, 2000, pp. 77–92; Ruth Abril Stoffels, ‘Legal regulation of humanitarian assistance in armed conflict: achievements and gaps’, in *International Review of the Red Cross*, Vol. 86, No. 855, 2004, pp. 515–546; Rebecca Barber, ‘Facilitating humanitarian assistance in international humanitarian and human rights law’, in *International Review of the Red Cross*, Vol. 91, No. 874, 2009, pp. 383–391.
- 6 The content and extent of the obligation to seek the consent of the relevant party or parties may be discerned by reference to the treaty provisions and customary law standards applicable to a specific situation. IHL treaty provisions pertaining to humanitarian access in international armed conflicts (including situations of occupation) include, among others, GC IV, Arts. 10, 11, 23, 30, 59, and 63; AP I, Art. 70(1). Such provisions in NIACs include Article 3 Common to the Geneva Conventions (‘An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict’); AP II, Art. 18. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Cambridge, 2005, ‘Rule 55’, pp. 196–197 (finding a rule of customary international law such that: ‘[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’). Regarding NIACs, AP II has a higher threshold of application than Common Article 3: AP II, Art. 1(1). AP II states that humanitarian organizations must obtain the consent of the High Contracting Party concerned: AP II, Art. 18(2). The ICRC’s *Commentary* on the provision states that, ‘In principle the “High Contracting Party concerned” means the government in power. In exceptional cases when it is not possible to determine which are the authorities concerned, consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any delay’. Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 4884. The *Commentary* further states that the state-consent requirement in Article 18(2) of AP II ‘does not in any way reduce the ICRC’s right of initiative’ laid down in Common Article 3; as a result, ‘the ICRC continues to be entitled to offer its services to each party’. *Ibid.*, paras. 4891–4892.

International humanitarian law bases for engagement with NSAGs

IHL provides solid bases for humanitarian engagement with NSAGs in NIACs.⁷ It does so, for example, in terms of offering humanitarian services (and by implication co-ordinating and delivering such services),⁸ as well as caring for the wounded and sick.⁹ The UN Security Council has reaffirmed these bases in at least two ways. First, the Council has increasingly called attention to the importance of 'all parties' to conflict in agreeing to and facilitating humanitarian relief operations, implying that NSAGs should co-operate with humanitarian organizations in the delivery of assistance.¹⁰ Second, the Council has requested humanitarian organizations'

7 Because NSAGs fulfilling certain criteria may be parties to NIACs only, this article focuses on IHL provisions applicable to that type of conflict. For an overview of IHL pertaining to humanitarian access in both international armed conflicts (including situations of occupation) and non-international armed conflicts, see, e.g., H. Speiker, above note 5, pp. 7–18.

8 Common Article 3; AP II, Art. 18. According to the ICRC, states may not regard an offer of humanitarian relief during an NIAC as an unfriendly act. Sandoz *et al.*, above note 6, p. 41; see also International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 242, stating generally that: 'There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law'.

While parties may impose certain conditions on relief actions, these conditions cannot intentionally inhibit the delivery of humanitarian assistance to the population, even behind enemy lines. See Sandoz *et al.*, above note 6, paras. 4887 and 4888, stating that: 'The [relief] actions would have to strictly comply with any conditions that might be imposed (examples: arrangement of transits in accordance with a precise timetable and itinerary, checking on convoys)', but emphasizing that: 'Once relief actions are accepted in principle, the authorities are under an obligation to co-operate, in particular by facilitating the rapid transit of relief consignments and by ensuring the safety of convoys'.

9 See, e.g., Common Article 3(2): 'The wounded and sick shall be collected and cared for'; AP II, Arts. 7, 8, 9(1): 'Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission'; 10(1): 'Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom'; and 18(1): 'Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked'.

10 See, e.g., UN Security Council Res. 1964, 22 December 2010, concerning the situation in Somalia (the Council 'Calls on all parties and armed groups to take appropriate steps to ensure the safety and security of humanitarian personnel and supplies, and demands that all parties ensure full, safe and unhindered access for the timely delivery of humanitarian aid to persons in need of assistance across the country'); UNSC Res. 1923, 25 May 2010, para. 22, concerning the situation in Chad, the Central African Republic, and Sudan (the Council 'Reaffirms the obligation of all parties to implement fully the rules and principles of international humanitarian law, particularly those regarding the protection of humanitarian personnel, and furthermore requests all the parties involved to provide humanitarian personnel with immediate, free and unimpeded access to all persons in need of assistance, in accordance with applicable international law'); UNSC Res. 1894, 11 November 2009, para. 14 (concerning its thematic area of 'Protection of civilians', the Council 'Stresses the importance for all parties to armed conflict to cooperate with humanitarian personnel in order to allow and facilitate access to civilian populations affected by armed conflict'). In addition to demanding that all parties to armed conflict adhere to their obligations under IHL, the Security Council has also demonstrated a tendency to urge all parties, including NSAGs, to ensure that the civilian population is protected and that the population's needs are met. See, e.g., UNSC Res. 1894, 11 November 2009, para. 1 (the Council 'Demands that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law,

support and co-operation in monitoring and reporting on violations by NSAGs and states' armed forces listed by the Secretary-General.¹¹ In other words, the Council has stated not only that NSAGs should engage with humanitarian organizations in order to ensure the provision of life-saving assistance but also that humanitarian organizations should engage with NSAGs as a means to prevent specific violations of IHL, particularly those against women and children. A conflict of norms arises between these provisions of IHL and UN Security Council decisions underlying humanitarian assistance, on the one hand, and criminal laws prohibiting the provision of material support or resources to listed 'terrorist' groups, on the other.

Counter-terrorism laws and policies limiting engagement with certain armed groups

While a range of states have enacted domestic laws and instituted policies similar to those developed by the United States, this article focuses on US criminal law and administrative counter-terrorism regulations, as well as related UN Security Council resolutions, for three reasons. First, since the *Holder v. HLP* Supreme Court decision, the US has the most well-articulated material-support jurisprudence, which may provide guidance on the calculus used by many states to limit or criminalize support to listed terrorist entities (including in, but certainly not limited to, situations of armed conflict). Second, since the 11 September 2001 terrorist attacks on the United States, the US has widely been seen as providing global leadership and intellectual innovation in the development and enforcement of domestic and international counter-terror regimes, often in the face of strident criticism. Third, while the UN Security Council resolutions discussed in this article are the result of multilateral negotiation and consensus, it is broadly recognized that the powerful and far-reaching resolutions on counter-terrorism were and continue to be deeply influenced by US approaches.¹² As such, current and future

as well as to implement all relevant decisions of the Security Council and in this regard, *urges* them to take all required measures to respect and protect the civilian population and meet its basic needs'); UNSC Res. 1417, 14 June 2002, para. 5 (concerning the situation in the Democratic Republic of the Congo, the Council 'calls on the de facto authorities in regions affected to ensure the protection of civilians and the rule of law'); UNSC Res. 1564, 18 September 2004, preamble (concerning the situation in Sudan, the Council stressed that 'the Sudanese rebel groups, particularly the Justice and Equality Movement and the Sudanese Liberation Army/Movement, must also take all necessary steps to respect international humanitarian law and human rights law'). See generally Aristotle Constantinides, 'Human rights obligations and accountability of armed opposition groups: the practice of the UN Security Council', in *Human Rights and International Legal Discourse*, Vol. 4, No. 1, 2010, pp. 89–110.

11 UNSC Res. 1612, 26 July 2005; UNSC Res. 1882, 4 August 2009; UNSC Res. 1960, 16 December 2010.

12 The role of the UN Security Council in formulating multilateral counter-terrorism policy should not be underestimated. In discussing why so many countries adopted similar counter-terrorism laws after 9/11, Kim Lane Scheppele has identified the change as 'radiat[ing] out from the U.N. Security Council'. Kim Lane Scheppele, 'The international standardization of national security law', in *Journal of National Security Law and Policy*, Vol. 4, 2010, p. 439.

developments of US counter-terrorism norms affecting humanitarian engagement merit close attention, not only in their broad extra-territorial reach but also insofar as they may influence multilateral frameworks and other domestic jurisdictions.¹³

United States counter-terrorism regime

The US counter-terrorism legal and policy regime, at least to the extent that it may affect humanitarianism, is comprised of statutes, executive orders, immigration and removal provisions, and administrative regulations, each of which is briefly outlined below.

Prohibitions on providing material support or resources

US federal law prohibits knowingly providing 'material support or resources' to foreign terrorist organizations (FTOs).¹⁴ For purposes of the statute, 'material support or resources' includes any property (tangible or intangible) or service (including lodging, training,¹⁵ expert advice or assistance,¹⁶ communications equipment, facilities, personnel,¹⁷ or transportation).

The only explicit exceptions to the prohibition under the federal statute pertain to the provision of medicine and religious materials. This provision is narrower than the exemption in an earlier version of a similar statute, which at the time exempted 'humanitarian assistance to persons not directly involved in such

13 The domestic law in other states, such as Australia, also has the capacity to affect humanitarian engagement with NSAGs. See, e.g., Criminal Code Act 12 of 1995, as amended, c. 102.1–102.8 (Australia). See generally Sara Pantuliano, Kate Mackintosh, and Samir Elhawary, with Vicki Metcalfe, 'Counter-terrorism and humanitarian action: tensions, impact and ways forward', in *HPG Policy Brief* 43, October 2011, pp. 2–5, available at: <http://www.odi.org.uk/resources/docs/7347.pdf> (last visited 4 December 2011); Harvard Program on Humanitarian Policy and Conflict Research, 'Humanitarian action under scrutiny: criminalizing humanitarian engagement', HPCR Working Paper, February 2011, pp. 23–25, available at: <http://www.hpcrresearch.org/research/criminalizing-humanitarian-engagement> (last visited 4 December 2011); Kristina Thorne, 'Terror lists and humanitarian assistance', in *Humanitarian Exchange Magazine*, Issue 37, March 2007, available at: <http://www.odihpn.org/report.asp?id=2874> (last visited 24 January 2012).

14 18 U.S.C. para. 2339B(a)(1); para. 2339B(g)(4); see also 18 U.S.C. para. 2339A(b)(1). As of September 2011, the Secretary of State had designated forty-nine organizations as FTOs; the list is available at: <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited 4 December 2011). US federal law also prohibits providing material support or resources to 'terrorists': 18 U.S.C. para. 2339A.

15 18 U.S.C. para. 2339A(b)(2), defined as 'instruction or teaching designed to impart a specific skill, as opposed to general knowledge'.

16 18 U.S.C. para. 2339A(b)(3), defined as 'advice or assistance derived from scientific, technical, or other specialized knowledge'.

17 According to the statute, 'No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with one or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.' 18 U.S.C. para. 2339B(h).

violations'.¹⁸ The currently applicable exemption for 'medicine' does not appear to encompass anything other than medicine itself and therefore seems to exclude all other activities (such as medical treatment or technical training) and resources (such as medical supplies or equipment) associated with the provision of medical assistance.¹⁹ While the statute provides a limited basis on which humanitarian organizations may apply to the government to be exempted from prosecution, the grounds for granting such an exemption are narrow.²⁰

Criminal liability arises from both the objective element of the crime (the so-called *actus reus* – that is, committing a prohibited, or omitting a required, act) and the subjective element (the so-called *mens rea* – having a specified level of knowledge or intent, or both, concerning the act). In terms of material support, the offender need not have intended to further the terrorist aims of the group to violate the statute. Rather, it is sufficient under the statute that the person providing material support has *knowledge* either that the organization is an FTO (that is, the organization is designated as such by the Secretary of State in accordance with US law) or that the organization has engaged or engages in terrorism or terrorist activity.²¹ The statute prohibits providing, attempting to provide, or conspiring to provide material support or resources to such organizations. A violation of the statute may entail a fine or imprisonment of up to fifteen years, or both. If the death of any person results, the violator 'may be imprisoned for any term of years or for life'.²² The US may exercise jurisdiction over an individual, even if he or she is not a US national, who violates (or aids, abets, or conspires with an individual who violates) the statute and who is later 'brought into or found in the [US], even if the conduct required for the offense occurs outside [the US]'.²³ In effect, this provision means that the personnel of an organization headquartered outside the US and made up entirely of non-US staff, with operations completely outside the US, could be subject to US criminal jurisdiction if they find themselves in the US.

18 18 U.S.C. para. 2339A (1994 edition); 110 Stat. 1214 title III, subtitle B sec. 323, 24 April 1996.

19 The House Conference Report accompanying the original legislation stated that medicine 'should be understood to be limited to the medicine itself, and does not include the vast array of medical supplies'. 5 H.Rept. 104–383, section 103, 1995. See also Ahilan T. Arulanantham, *Testimony at Oversight Hearing on Amendments to the Material Support for Terrorism Laws: Section 805 of the USA PATRIOT Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004, Before the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary*, 10 May 2005, arguing that: '[t]o prevent outbreaks, humanitarian organizations must provide displaced people with water purification systems, toilets, tents, and other such goods which are not "medicine" but nonetheless serve an absolutely critical medical function'.

20 'No person may be prosecuted under this section in connection with the term "personnel", "training", or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General'. 18 U.S.C. para. 2339B(j). However, the statute provides that the 'Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity'. 18 U.S.C. para. 2339B(j).

21 'Terrorism' as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, and 'terrorist activity' as defined in section 212(a)(3)(B) of the Immigration and Nationality Act.

22 18 U.S.C. para. 2339B(a)(1).

23 18 U.S.C. para. 2339B(d)(1)(C).

In June 2010, in *Holder v. HLP*, the US Supreme Court upheld the constitutionality of the statute that prohibits knowingly providing ‘material support or resources’ to designated FTOs. The case arose as a pre-enforcement challenge brought by two organizations and six individuals seeking a ruling as to whether the three activities that the plaintiffs wanted to engage in would violate the statute, and, if so, whether the statute as applied to those proposed activities would contravene the US Constitution. In short, the Humanitarian Law Project (HLP) and others wanted to engage in three proposed activities, but could not for fear of prosecution under the statute. Those three activities were: training members of the Kurdistan Worker’s Party (PKK) to use international law to resolve disputes; teaching PKK members how to petition various representative bodies such as the United Nations for relief; and engaging in political advocacy on behalf of Kurds living in Turkey or Tamils living in Sri Lanka. The HLP argued that certain constitutional protections – including freedom of speech and association, and due process of law (which prohibits overly vague criminal laws) – precluded the government from enforcing the statute against the HLP’s proposed activities.²⁴

The litigation leading to the Supreme Court’s judgment in *Holder v. HLP* spent many years making its way through US courts.²⁵ In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act, a section of which defines the crime of providing material support or resources to terrorists.²⁶ In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, which amended the section prohibiting material support to terrorists and added a section prohibiting the provision of material support or resources to FTOs.²⁷ Combined, these federal criminal statutes set out the crimes of providing ‘material support or resources’ to terrorists and foreign terrorist groups, and enumerate the broad set of activities seen as providing benefit to these groups. Both sections were amended by the post-9/11 USA PATRIOT Act of 2001 (which increased the penalties for committing ‘material support’ crimes and added ‘expert advice or assistance’ to the list of prohibited forms of support), and by the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, which amended and clarified definitions within the two sections.²⁸ After a lower-court decision voided language in the statute for vagueness, the government appealed the decision, and the Supreme Court accepted the case. In

24 *Holder v. HLP*, Opening Brief for Humanitarian Law Project, et al., pp. 17–21.

25 *Humanitarian Law Project v. Reno*, 9 F.Supp.2d 1176, C.D.Cal. (1998); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 9th Cir. (2000); *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185, C.D.Cal. (2004); *Humanitarian Law Project v. United States Department of Justice*, 393 F.3d 902, 9th Cir. (2004); *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134, C.D.Cal. (2005); *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 9th Cir. (2009); *Humanitarian Law Project v. Holder*, 130 S. Ct. 48, (2009); US Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

26 18 U.S.C. para. 2339A.

27 18 U.S.C. para. 2339B.

28 For an excellent summary of the statute and its legislative history, see Charles Doyle, *Terrorist Material Support: An Overview of 18 U.S.C. 2339A and 2339B*, Congressional Research Service, 19 July 2010, available at: <http://www.fas.org/spp/crs/natsec/R41333.pdf> (last visited 4 December 2011). The Center for Constitutional Rights, which litigated the case, hosts a collection of pleadings and decisions pertaining to the case, including all the case documents referenced in this section, available at: <http://ccrjustice.org/holder-v-humanitarian-law-project> (last visited 4 December 2011).

short, the Court was asked to consider the claim that the statute was unconstitutional because it was either too vague or too broad in relation to the HLP's proposed activities.

In its opening brief to the Supreme Court, the HLP argued that the First Amendment to the US Constitution (which states that 'Congress shall make no law ... abridging the freedom of speech') protected their intended activities, which they characterized as pure political speech; that the material-support statute was unfairly vague; that portions of the statute impermissibly criminalized pure speech and discriminated on the basis of content; and that the statutory provisions at stake violated the constitutionally enshrined freedom to associate.²⁹ The HLP asserted that the Court could avoid addressing constitutional questions by interpreting the statute to require proof of intent to further an FTO's unlawful ends.³⁰

The government's arguments relied largely on the specificity included in the IRTPA, which amended the existing statute in regard to the terms 'knowingly', 'service', 'training', 'expert advice or assistance', and 'personnel'. The government argued that the statute is not void for vagueness just because the application of the terms 'training', 'expert advice or assistance', 'personnel', or 'service' may be difficult to define in some circumstances. Rather, the government stated, '[v]agueness lies not in occasional uncertainty about whether an incriminating fact has been proved, but in fundamental indeterminacy about what that fact is'.³¹ The government highlighted the difference between membership in a designated terrorist group or independent promotion of the political goals of the group – which were not prohibited by the statute – and the act of 'giving material support to facilitate terrorism', for which there was no constitutionally protected right.³² The government stated that the petitioners 'may join the PKK and LTTE, gather with those groups' members, and discuss subjects of mutual interest'.³³ According to the government's viewpoint, the material-support statute regulated activity when the petitioner wanted to 'do more than engage in discussion with terrorist groups'.³⁴

Multiple organizations submitted *amicus curiae* ('friend of the court') briefs to the Supreme Court. One *amicus* brief brought by a collection of non-governmental organizations (NGOs) mentioned that the statute could deleteriously affect the delivery of humanitarian aid. Foregrounding the discussion by declaring that the '[p]rovision of humanitarian aid often requires working with and providing

29 *Holder v. HLP*, Opening Brief for Humanitarian Law Project, et al., pp. 17–21.

30 *Ibid.*, pp. 21–22.

31 *Holder v. HLP*, Brief for the Government (respondents), p. 14.

32 *Holder v. HLP*, Reply Brief for the Government (respondents), p. 38, citing *Humanitarian Law Project v. Reno*, 205 F.3d, 1130, 1133, 9th Cir. (2000). In its Opening Brief, the Government – citing a Supreme Court decision explaining that 'peaceable assembly for lawful discussion cannot be made a crime' – argued that the material-support statute at issue 'is fully consistent with this principle: it does not prevent petitioners from peaceably assembling with members of the PKK and LTTE for lawful discussion. It prevents the separate step of rendering material support, in the form of property or services, to these groups based on their demonstrated willingness to commit acts of terror rather than on their political views.' Opening Brief for the Government (respondents), p. 61, citing *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

33 *Holder v. HLP*, Reply Brief for the Government (respondents), p. 39.

34 *Ibid.*

expert advice and technical assistance to local actors', the organizations stressed that, when providing such aid, they 'adhere strictly to certain universal principles of humanitarian assistance. These principles require all providers of aid to draw sharp lines between humanitarian activities, which they support, and military activities, which they do not'.³⁵ Nonetheless, the organizations noted, 'in the context of war zones, particularly in geographic areas controlled or dominated by designated groups, some form of engagement with these groups, their members, or their supporters is sometimes inevitable'.³⁶ The organizations argued that, when providing instructions or guidance to local groups to further humanitarian aid operations, they were engaging in First Amendment-protected activity. At the same time, the organizations observed that the material-support statute does 'not clearly delineate the space available for *amici* to conduct on-the-ground humanitarian aid activities', and gave examples pertaining to Sri Lanka.³⁷

The US's obligations under international law were not raised or addressed by the plaintiffs, the government, or the Court.³⁸ Potentially to the surprise of individuals trained in legal systems in which international law is automatically incorporated into domestic law or in which international law provides a stand-alone basis for individuals to bring legal challenges against domestic laws, in the US litigators rarely rely solely on international law to challenge federal statutes. Rather, US lawyers frame their legal challenges in terms of constitutional rights.³⁹ Partly as a result, the Supreme Court does not assess the US's compliance with its international legal obligations with the frequency with which some other countries' highest courts assess their respective governments' compliance with international law. It is not clear at the time of writing how the US government would view the material-support statute in light of its IHL or international human rights law obligations.⁴⁰

35 *Holder v. HLP*, Brief of *Amicus Curiae* of the Carter Center, Christian Peacemaker Teams, Grassroots International, Human Rights Watch, International Crisis Group, the Institute for Conflict Analysis and Resolution at George Mason University, the Kroc Institute for International Peace Studies at Notre Dame University, Operation USA, and Peace Appeal Foundation in Support of Humanitarian Law Project, *et al.*, 23 November 2009, pp. 25–26.

36 *Ibid.*, p. 26.

37 *Ibid.*, pp. 26–27.

38 The dissent referred to the Geneva Conventions in relation to what type of 'relief' was meant by the plaintiffs' proposal to 'teach PKK members how to petition various representative bodies such as the United Nations for relief' (internal citations omitted; emphasis added in the dissent). US Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2739 (2010).

39 An overview, with an emphasis on criminal procedure, of how – and the extent to which – various systems incorporate international legal norms into their domestic legal orders is available in Chrisje Brants and Stijn Franken, 'The protection of fundamental human rights in criminal process: general report', in *Utrecht Law Review*, Vol. 5, October 2009, pp. 7, 14–16.

40 For discussions about the compatibility of the US's IHL obligations with its domestic counter-terrorism laws, see Justin A. Fraterman, 'Criminalizing humanitarian relief: are US material support for terrorism laws compatible with international humanitarian law?', January 2011, available at: <http://ssrn.com/abstract=1750963> (last visited 4 December 2011); Elizabeth Holland, 'Holder v. Humanitarian Law Project and the potential to cripple humanitarian assistance in armed conflict', June 2011, available at: <http://ssrn.com/abstract=1939008> (last visited 4 December 2011); Jennifer R. White, 'IIEPA's override authority: potential for a violation of the Geneva Conventions' right to access for humanitarian organizations?', in *Michigan Law Review*, Vol. 104, No. 8, 2006, pp. 2019–2055.

In a 6–3 ruling, the majority of the Supreme Court upheld the constitutionality of the statute. The Court used a broad conception of fungibility rooted in congressional findings – namely that, while some FTOs engage in political and humanitarian activities, such organizations ‘are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct’.⁴¹ The Court noted that ‘Congress has avoided any restriction on independent advocacy’, which would have been prohibited, ‘or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups’.⁴² Three justices dissented, stating that at a minimum the government should have to show that the ‘defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims’.⁴³

Executive Order 13224

President George W. Bush issued Executive Order 13224 (EO 13224) on 23 September 2001.⁴⁴ The Department of the Treasury’s Office of Foreign Assets Control (OFAC) administers the Order, which allows government authorities to designate and block (that is, freeze) the assets of individuals and entities that, among other things, ‘assist in, sponsor, or provide financial, material, or technological support for ... or other services to or in support of’ certain acts of terrorism or designated terrorists or terrorist groups, or that are ‘otherwise associated with’ designated terrorists or terrorist groups.⁴⁵ OFAC places the designated person or entity on its list of ‘Specially Designated Nationals’ (SDNs) and identifies them as ‘Specially Designated Global Terrorists’ (SDGT). With limited exceptions, all property and interests in property of designated parties in the US are frozen, as are transactions by US persons or within the US in such property or interests in property, including making a contribution of services for the benefit of designated parties. EO 13224 prohibits donations by US persons to designated parties of articles intended to relieve human suffering, such as food, clothing, and medicine.⁴⁶ OFAC may grant general or specific licenses to organizations to engage in certain forms of activity otherwise prohibited under EO 13224, yet it is difficult to discern from publicly available information the extent to which humanitarian organizations have successfully obtained such licenses.

Through an amendment in the USA PATRIOT Act, the government may impose all the blocking effects of a designation – including freezing the party’s assets and criminalizing its transactions – without actually designating the party as an

41 US Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2710, 2724, 2729 (2010).

42 *Ibid.*, at 2711.

43 *Ibid.*, at 2740.

44 Pursuant to the authorities of the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code.

45 EO 13224, sections 1(c)–(d).

46 EO 13224, section 4; see also 50 U.S.C. para. 1702(b)(2).

SDGT.⁴⁷ To impose all the freezing effects, the government needs only to assert that it has opened an investigation into designating the entity.

OFAC has listed several thousand organizations and numerous individuals, most of whom are non-US parties, under EO 13224.⁴⁸ US organizations subject to EO 13224, which have a stronger constitutional basis to challenge the Order, have brought legal actions against the imposition of sanctions without a warrant based on probable cause and fair notice of the charges,⁴⁹ as well as against the timing and process of a designation.⁵⁰ These challenges have not, thus far, made reference to the provisions of IHL discussed in the previous section.

Immigration and removal provisions

In addition to being subject to criminal and civil proceedings, non-US individuals who provide material support to certain NSAGs may be denied admission to, or deported from, the US. In this way, counter-terrorism laws, in conjunction with immigration and removal provisions, may affect humanitarian relief personnel attempting to visit, reside in, or immigrate to the US.⁵¹ For example, an alien may be denied admission to, or deported from, the US for,

commit[ting] an act that the individual . . . reasonably should [have] know[n] provides material support to . . . a designated organization . . . or . . . a non-designated terrorist organization or a member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.⁵²

Given the lack of publicly available records of most immigration proceedings, as well as the possibility that the threat of this provision could be utilized to dissuade individuals from pursuing immigration or asylum claims, the extent or degree to

47 Section 106 of the USA PATRIOT Act amended the IEEPA by adding the phrase 'block during the pendency of an investigation' after the word 'investigate' in 50 U.S.C. para. 1702 (a)(1)(B).

48 The list of parties subject to EO 13224 are on OFAC's website, available at: <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last visited 4 December 2011).

49 *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp.2d 857 (N.D. Ohio 2009).

50 *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, Civil No. 07-1155-KI, 2009 WL 3756363 (D. Or. Nov. 5, 2009); *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 585 F.Supp. 2d 1233 (D. Or. 2008).

51 A commentator recently raised related concerns regarding the scope of these provisions in the context of relief efforts in Libya: 'any non-citizens who work for humanitarian agencies – such as my colleagues on our emergency response team from Ireland, Australia, France, and Canada – could be barred from entering or returning to the U.S. for providing "material support" to a "terrorist group". Even U.S. citizens could face prosecution on these grounds'. Anne Richards, 'On the Libyan border: helping freedom fighters or terrorists?', *The Hill's Congress Blog*, 28 March 2011, available at: <http://thehill.com/blogs/congress-blog/foreign-policy/152143-on-the-libyan-border-helping-freedom-fighters-or-terrorists> (last visited 4 December 2011).

52 Immigration and Nationality Act, para. 212(a)(3)(B)(iv); 8 U.S.C. para. 1182(a)(3)(B)(iv). See generally Michael John Garcia and Ruth Ellen Wasem, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, Congressional Research Service, 12 January 2010, available at: <http://www.fas.org/sgp/crs/homsec/RL32564.pdf> (last visited 4 December 2011).

which this provision has been utilized in the immigration context is unknown. In any event, aside from the impact on humanitarian engagement highlighted elsewhere in this article, those working on refugee, asylum, and resettlement issues must also be increasingly aware of the relationship between the counter-terrorism framework and the international and domestic norms protecting asylum seekers and refugees.⁵³

Administrative regulations

In order to ensure that funds are not diverted to proscribed terrorist organizations, '[a]ll NGOs applying for grants from USAID [United States Agency for International Development] are required to certify, before award of the grant will be made, that they do not provide material support to terrorists'.⁵⁴ Such certifications require the recipients of USAID funding to attest they have not provided (within ten years) and will not provide material support or resources to FTOs, to SDNs or SDGTs, or to individuals or entities designated by the UN Security Council's sanctions committee established under Security Council Resolution 1267.⁵⁵ In addition to reviewing those lists, USAID recipients must certify that they will take into account public information that is 'either reasonably available to the applicant . . . or that, from the totality of the facts and circumstances . . . the applicant should be aware of an individual or entity's terrorist ties'.⁵⁶ More detailed vetting procedures are reportedly required for NGOs applying for USAID grants to areas such as the West Bank, Gaza, Somalia, Afghanistan, and Yemen.⁵⁷

These USAID certifications expressly do not extend to

furnishing USAID funds or USAID-financed commodities to the ultimate beneficiaries of USAID assistance . . . unless the Recipient has reason to believe that one or more of the beneficiaries commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts.⁵⁸

53 See, e.g., Steven H. Schulman, 'Victimized twice: asylum seekers and the material-support bar', in *Catholic University Law Review*, Vol. 59, No. 4, 2009–2010, p. 949; Human Rights First, *Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States*, November 2009, available at: <http://www.humanrightsfirst.org/wp-content/uploads/pdf/RFP-DenialandDelay-FULL-111009-web.pdf> (last visited 4 December 2011).

54 Statement issued by USAID to the Congressional Research Service on 5 February 2009. Jim Zanotti, U.S. *Foreign Aid to the Palestinians*, Congressional Research Service, 13 January 2011, p. 7, available at: <http://www.fas.org/sgp/crs/mideast/RS22967.pdf> (last visited 24 January 2012).

55 USAID, 'AAPD 04–14: Certification regarding Terrorist Financing Implement E.O. 13224 (Revision 2)', *Acquisition & Assistance Policy Directive*, 24 September 2004, p. 3, available at: http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd04_14.pdf (last visited 4 December 2011).

56 *Ibid.*, p. 4.

57 Testimony of Dr Rajiv Shah, USAID Administrator, Senate Appropriations Subcommittee, 12 April 2010, available at: http://kirk.senate.gov/?p=press_release&id=137 (last visited 4 December 2011).

58 USAID, 'AAPD 04–14', above note 55, para. d of the certification.

As with the material-support statute and EO 13224, relatively little is currently known about the ultimate depth of these certifications in terms of their impact on end-user beneficiaries of humanitarian goods.

Multilateral counter-terrorism regimes

Security Council Resolution 1267 (1999) et seq. and Security Council Resolution 1373 (2001) et seq.

Acting under the authority of Chapter VII of the UN Charter, the UN Security Council has created two counter-terrorism regimes with the capacity to affect humanitarian engagement with NSAGs, one of which is focused on the Taliban and Al Qaeda, while the other is not specific to a particular group. It is hard to overstate the normative power of resolutions decided under the Council's Chapter VII authority. UN member states are obliged to accept them and carry them out, including, where necessary, by enacting domestic laws.⁵⁹ Extensive bureaucracies have been built to enforce both regimes. While neither counter-terrorism regime instituted by the Security Council under review here may yet function to regulate humanitarian action in all UN member states in the same manner and with the same clarity as the US material-support law, the language of both resolutions – and especially Resolution 1373 – can clearly be utilized by states, particularly host states, wishing to restrict humanitarian organizations' access to and engagement with NSAGs.

Resolutions 1267 (1999) *et seq.* require all UN member states to freeze the funds and other financial assets of individuals and entities designated by a sanctions committee, as well as to prevent the entry or transit through their territories of designated individuals.⁶⁰ As of March 2011, the Consolidated List included 395 individuals and 92 entities and other groups associated with the Taliban or Al Qaeda.⁶¹ Resolutions 1373 (2001) *et seq.* require all UN member states to '[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts', as well as to prohibit their nationals and individuals in their territories from making economic or financial resources or services, among other things, available for the benefit of individuals or entities involved in certain terrorist acts.⁶² Resolution 1373 further obliges all UN member states to '[c]riminalize the willful provision . . . , by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be

59 UN Charter, Art. 25. See also UN Charter, Art. 103.

60 UNSC Res. 1267, 15 October 1999; UNSC Res. 1333, 19 December 2000; UNSC Res. 1390, 28 January 2002; UNSC Res. 1455, 17 January 2003; UNSC Res. 1526, 30 January 2004; UNSC Res. 1617, 29 July 2005; UNSC Res. 1735, 22 December 2006; UNSC Res. 1822, 30 June 2008; and UNSC Res. 1904, 17 December 2009.

61 The Consolidated List is available at: <http://www.un.org/sc/committees/1267/consolist.shtml> (last visited 4 December 2011).

62 UNSC Res. 1373, 28 September 2001, paras. 1(d) and 2(a). UNSC Res. 1456, 20 January 2003; UNSC Res. 1535, 26 March 2004; UNSC Res. 1624, 14 September 2005; UNSC Res. 1787, 10 December 2007; UNSC Res. 1805, 20 March 2008; and UNSC Res. 1963, 20 December 2010.

used, or in the knowledge that they are to be used, in order to carry out terrorist acts', and to '[e]nsure that any person who participates ... in supporting terrorist acts is brought to justice'.⁶³ Domestic and international legal challenges to the implementation of the 1267 and 1373 regimes have been brought in courts in the European Community, the US, the United Kingdom, Italy, Switzerland, Pakistan, Turkey, and Canada, as well as in the Human Rights Committee.⁶⁴ Thus far, these challenges have focused on the due process concerns pertaining to the mechanisms for listing and de-listing, not on humanitarian engagement concerns as such.

Understanding government approaches, discerning the impact on humanitarian organizations, and exploring possible humanitarian responses

The two normative trajectories described above – one rooted in IHL recognizing the importance of humanitarian engagement with NSAGs in NIACs, and the other aiming to prohibit the provision of material support to 'terrorist' groups – seem to evince a clear contradiction. For many, this raises questions: what are the ultimate goals of governments promulgating such opposing normative frameworks? How can humanitarian organizations better understand the approaches taken by governments, particularly those deeply involved in the global humanitarian project as donors and policy innovators? This section briefly explores potential explanations that might assist in interpreting states' behaviours regarding these countervailing norms. The section then discusses what impacts these differing norms might have on humanitarian organizations, and how humanitarian organizations might respond to them.

Understanding government approaches

This subsection briefly identifies four potential explanations of states' behaviours that, on the one hand, recognize the importance of humanitarian engagement with NSAGs in NIAC, and, on the other hand, curtail such engagement through counter-terrorism laws and policies.

⁶³ UNSC Res. 1373, paras. 1(b) and 2(e).

⁶⁴ See generally Antonios Tzanakopoulos, 'United Nations sanctions in domestic courts: from interpretation to defiance in *Abdelrazik v. Canada*', in *Journal of International Criminal Justice*, Vol. 8, No. 1, 2010, pp. 249–251; Yvonne Terlingen, 'The United States and the UN's targeted sanctions of suspected terrorists: what role for human rights?', in *Ethics & International Affairs*, Vol. 24, No. 2, 2010, pp. 131–142. The UN Special Rapporteur on Terrorism, Counter-Terrorism and Human Rights has stated that Resolution 1373's 'continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. Resolution 1373 (2001) goes beyond the powers conferred upon the Security Council and continues to pose risks to the protection of a number of international human rights standards'. Sixth Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN General Assembly, A/65/258, 6 August 2010, para. 69.

Total prohibition

The first possible explanation sees the ultimate goal of the state in this regard as *total prohibition* of any benefit to, assistance for, or co-ordination with listed NSAGs, even if that prohibition risks the loss of humanitarian services to civilian populations or the disbanding of major humanitarian operations in territories controlled by listed NSAGs. This explanation is reflected, for example, in a broad 2001 call by the then US Secretary of Defense to end all 'support' benefitting 'terrorists'.⁶⁵

The 'total prohibition' understanding sees the state as coherent and strategic in its thinking. The state is making a clear choice to favour security interests over humanitarian principles or humanitarian rationales for engagement with NSAGs. In this mode, states may even see humanitarian organizations as naïve 'soft spots' in counter-terrorism efforts, unthinkingly and unknowingly providing succour and political legitimacy to dangerous militant groups.

Mitigation

The second possible explanation for these countervailing regulatory trajectories is that states seek mitigation of benefits to NSAGs. Under this model, states wish to utilize domestic laws and international and donor policies to rein in humanitarian actors' interactions with NSAGs because they wish to limit the threats that this interaction presents to security by making humanitarian organizations more accountable. This explanation holds that, rather than being contradictory, the two trajectories are meant to signal that humanitarian organizations will be held responsible, if they do not take certain prescribed steps, for their engagement with listed NSAGs. The 'mitigation' explanation is reflected, for example, in the monitoring-and-reporting requirements imposed by the UN Security Council in the limited humanitarian-assistance carve-out for Somalia in Resolution 1916.⁶⁶

A policy of 'mitigation' may be rational for individual states, and may indeed serve as part of a coherent approach to making humanitarian organizations more accountable. Yet it may be impossible for any global humanitarian actor to satisfy all of the mitigation and accountability standards of various individual donors, states, and multilateral agencies.

Fragmentation

A third explanation suggests a lack of integration of internal policies, with some state organs supporting counter-terrorism measures as a priority and others promoting humanitarian action. In some ways the opposite of prohibition of

65 Donald Rumsfeld, Transcript, Department of Defense News Briefing, 18 September 2001, available at: http://replay.web.archive.org/20041118041827/http://www.defense.gov/transcripts/2001/t09182001_t0918sda.html (last visited 4 December 2011).

66 UNSC Res. 1916, 19 March 2010, paras. 4, 5, and 11; see also UNSC Res. 1972, 17 March 2011.

engagement with NSAGs, ‘fragmentation’ holds that the seemingly incoherent and confusing nature of these trajectories is just that: incoherent and confusing. The ‘fragmentation’ model proposes that states lack internal consistency, with counter-terrorism and humanitarianism competing for normative supremacy. The uncertainty resulting from fragmentation may be intentional or unintentional, but this model holds that there is no overarching state policy to be identified. As an example, when certain data regarding the tremendous scope of US funding for humanitarian assistance⁶⁷ are read next to the material-support statute,⁶⁸ it would appear that the various branches (and sub-branches) of the US government are not necessarily acting in concert.

Under the ‘fragmentation’ theory, states would be seen as internally divided and lacking in proper channels of communication within their own government agencies. In this understanding, it may be that the state, writ large, is not fully aware of the functional impact of its counter-terrorism laws and policies on international aid and assistance. Indeed, the state may lack a grand strategy of how the two trajectories should be harmonized. Of course, it may be that counter-terrorism laws and policies reflect states’ desire to keep multiple political and security objectives in play, and that this approach to foreign policy may allow states to keep humanitarian actors in a defensive posture.

Co-optation

The final explanation for the behaviour of states is co-optation. Rather than seeking to engage in a ‘course correction’ by making humanitarian organizations more accountable, or rather than wishing to limit what they see as the excesses of humanitarian willingness to bend to the wishes of armed actors, states instead see the two countervailing trajectories as a basis for ‘co-optation’ of humanitarianism into the security and political objectives of the state. This perspective sees humanitarian organizations as providing key intelligence to security actors, as well as direct military relief efforts.⁶⁹

67 Global Humanitarian Assistance, ‘United States: country profile’, available at: <http://www.globalhumanitarianassistance.org/countryprofile/united-states> (last visited 4 December 2011): ‘The United States is the largest humanitarian donor, providing over US\$4 billion in humanitarian aid in both 2008 and 2009. Sudan has been the top recipient of the United States’ humanitarian aid each year since 2004, receiving US \$674 million in 2008. The United States provides the majority of its humanitarian aid as food aid – over US\$2 billion in 2008, the largest single share of which (US\$538 million) went to Ethiopia. The United States provides a relatively high share of its overall aid budget in the form of humanitarian assistance – over 16% in 2008.’

68 18 U.S.C. para. 2339B(a)(1): ‘Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.’

69 See, e.g., Robert Burns, ‘Envoy laments weak US knowledge about Taliban’, Associated Press, 7 April 2009, available at: http://seattletimes.nwsources.com/html/nationworld/2008961176_apusafghanistan.html (last visited 24 January 2012): ‘[Richard] Holbrooke said the U.S. would “concentrate on [the information deficit in Afghanistan], partly through the intelligence structure” and partly through private aid groups that provide humanitarian and other services in Afghanistan. He estimated that 90 percent of U.S. knowledge about Afghanistan lies with aid groups.’ See also US Embassy, Islamabad, ‘U.S. troops reach

In a ‘co-optation’ approach, governments may be seen as responding to the diversion of humanitarian assistance and the potential legitimization of terrorist groups, not by engaging in regulation to mitigate this harmful effect but rather by structuring regulation so that humanitarian organizations are increasingly incorporated into the aid, reconstruction, and national security agenda of the state. This approach sees humanitarianism and the access of the humanitarian community to the ‘hearts and minds’ of the civilian population as central to contemporary counter-insurgency and counter-terrorism efforts.

Potential impacts for humanitarian organizations and possible responses

This subsection explores the question of how the complex web of laws and policies discussed above might affect humanitarian organizations and their work in situations of NIAC, and then identifies a few potential ways in which humanitarian organizations might respond to these impacts.

It is, of course, impossible to determine with certainty the likelihood of actual prosecutions against humanitarian organizations or their staff. Combined, the counter-terrorism laws discussed here and the interpretations of these laws by the relevant government body (whether it be the US Supreme Court, the Department of Justice, OFAC, or USAID) create a threat to a large array of activities that are, nonetheless, often sanctioned, encouraged, planned, and funded by the same government. Donor governments may maintain this posture – as informal, tenuous, and implicit as it may be – so long as they do not perceive the concerned FTOs as presenting insuperable threats to the state’s security or its political interests. States might (retroactively) invoke their criminal laws or other sanctions against humanitarian organizations, however, if this balance tips in favour of perceived security.

Even assuming the continued trend of non-prosecution of international humanitarian organizations continues, what are the other potential impacts of these laws and policies beyond criminal liability? Despite the absence of sufficient empirical or case-based studies on the effect of these criminal and regulatory laws on the humanitarian field, a number of possible impacts bear consideration by the humanitarian profession as a whole.

First, it may be that the presence and indeed expansion of laws criminalizing material support (including training and expert assistance) to listed entities will begin to affect governments’ funding choices. That is, where governments become aware that their humanitarian aid funding will be used in a state whose territory is partially or totally controlled by a listed group, those governments may determine that there is no way to continue this funding without

flood relief milestone, deliver 25 million pounds of aid’, United States Central Command, 23 November 2010, available at: <http://www.centcom.mil/pakistan-flood/u-s-troops-reach-flood-relief-milestone-deliver-25-million-pounds-of-aid> (last visited 4 December 2011), stating that ‘U.S. military aircraft supporting Pakistan’s flood relief efforts achieved another humanitarian milestone Sunday, delivering 25 million pounds of relief supplies since Aug. 5, when U.S. military relief flight operations in Pakistan began.’

risking the support ultimately falling into the terrorists' hands. There is some indication that this has already occurred, for example in the case of Somalia, where a designated group (namely al-Shabaab, which is listed at both the US and international levels) controls much of the territory.⁷⁰

Second, one of the most vexing and complex impacts of the laws and policies discussed here may be virtually impossible to measure and weigh against the benefits of such legislation for counter-terror purposes: the chilling effect. This occurs when organizations, faced with the risk of criminal sanction or intimidated by increasingly strict administrative procedures required for projects carried out in areas where listed groups are active,⁷¹ may simply decide to cut back on or halt their projects before any action is taken against them. Anecdotally, there is some evidence of organizations ceasing training activities, diminishing the scope of their proposals for government funding in emergency contexts, or reconsidering priorities where they sense a high risk of liability.⁷² Because of the confusing and contradictory nature of these laws and policies, a significant risk of the chilling effect is that humanitarian organizations will limit *themselves* far beyond the actual limits of the law. The organizations may choose to take a conservative approach, which is thus less beneficial to civilian populations in need, in order to salvage their most critical programmes. Given the current general sense that staff from certain countries or certain faith groups are at higher risk of scrutiny or criminal liability, organizations may selectively limit their partner organizations, their staff, or their co-operation, in order to limit their exposure.

Possible humanitarian responses

In reviewing the provisions of IHL relevant to the work of independent, impartial humanitarian organizations in situations of NIAC, it is clear that the space for credible organizations to engage with *all* parties to the conflict, and especially those that control access to vulnerable populations, is central to the notion of neutral humanitarianism. Indeed, in an armed conflict setting, where humanitarian assistance may be the only reliable source of life-saving food, clean water, medical care, shelter, and clothing for civilians behind enemy lines, the capacity of humanitarian organizations to negotiate directly with parties to the conflict (without the suspicion that they represent the foreign policy goals of other parties

70 Jeffrey Gettleman, 'U.N. officials assail U.S. on limiting Somali aid', in *New York Times*, 18 February 2010, p. 8, reporting that in 2009 'the American government provided less than half of what it did in 2008 for Somalia aid operations partly because United Nations agencies and private aid groups refused to sign an agreement to police the distribution of aid more closely, contending that it would make deliveries nearly impossible'.

71 Such as the anti-terror certifications, described above in the section on 'Administrative regulations'.

72 The UN Special Rapporteur on Terrorism, Counter-Terrorism and Human Rights noted during a press conference that there was a feeling within the humanitarian field that Resolution 1267 had a 'chilling effect' on humanitarian aid, owing to the risk that charity aid would be identified as indirectly funding terrorist organizations. UN Department of Public Information, 'Press Conference by Special Rapporteur on Protecting Human Rights While Countering Terrorism', 26 October 2010, available at: http://www.un.org/News/briefings/docs/2010/101026_Scheinin.doc.htm (last visited 4 December 2011).

to the conflict)⁷³ is one of the most crucial tools for these organizations to maintain their neutral posture and to serve those in need. This space for engagement and protected autonomy to deal with even the most unsavoury leaders in order to offer basic services to the civilian population is at the crux of IHL's modest recognition of the role and responsibility of humanitarian organizations in alleviating suffering.

Scholars have noted that IHL does not create a 'right of humanitarian access' or an unlimited mandate for humanitarian organizations to carry out any activities they wish at any time and in any manner they choose.⁷⁴ Yet, at the very least, IHL applicable in NIACs recognizes that impartial humanitarian organizations may *of their own volition* offer their services to the parties to the conflict.⁷⁵ Indeed, with the adoption of Common Article 3 more than sixty years ago, parties to NIACs 'can no longer look upon it [such an offer of humanitarian services] as an unfriendly act, nor resent the fact that the organization making the offer has tried to come to the aid of the victims of the conflict'.⁷⁶ It is this assumption that the counter-terrorism model turns on its head.

If the types of impact identified above are seen as largely affecting projects and programmes, humanitarian organizations may develop a range of strategic and tactical responses, ranging from conceding (partial) incorporation into security and political approaches to (selectively) ending relationships with certain donors to (temporarily) ceasing activities in certain NIACs such as those in Pakistan and Afghanistan.⁷⁷ However, in reacting to the more existential threat cutting to the core of humanitarianism – that is, the autonomy to engage directly with all parties to an armed conflict and offer services for the benefit of the civilian population – humanitarian organizations may develop responses at the underlying normative level, as discussed below.

Developing new norms to regulate humanitarian engagement with NSAGs

If the tensions between humanitarian law and policy, on the one hand, and counter-terrorism law and policy, on the other, are as fundamental as highlighted here, the humanitarian community may determine that the only way out of the impasse is to focus on the creation of new national or international norms clearly delineating the role, means, and methods of humanitarian organizations engaging with NSAGs in situations of NIAC. These norms might come in the form of a new treaty on NIAC, or some other international declaration of principled humanitarianism to be codified in national laws. In previous moments of IHL innovation and development, humanitarian restraints on state military and security interests have prevailed in

73 As mentioned in note 8 above, according to the ICRC offers of humanitarian relief in NIAC may not be regarded as unfriendly acts.

74 See, e.g., Y. Dinstein, above note 5.

75 Common Article 3. See above notes 6 and 8, and the corresponding text.

76 Sandoz *et al.*, above note 6, p. 41.

77 Harvard Program on Humanitarian Policy and Conflict Research, above note 13, pp. 27–37.

treaty texts. Yet the moral basis upon which leading humanitarian organizations participated in these earlier high moments of IHL law-making and interpretation may today be insufficient to sustain the legal reaffirmation of independent interactions with NSAGs. When internal conflicts are framed as efforts to combat terrorism, such interactions, however benevolent in intent, may be seen as creating unacceptable risks for states' political and security goals.

Developing new policy avenues to facilitate negotiation of access with NSAGs

If the terms of engagement with NSAGs cannot be developed in an open and formal dialogue with states, the terms may need to be elaborated by the organizations themselves as professional standards against which the activities of the organizations can be assessed. Unlike the option of developing norms and focusing on positive law, this policy-oriented approach is likely to involve ad hoc agreements with states and military representatives within a variety of contexts, and may be far more difficult to co-ordinate across the humanitarian profession. Some have argued that the policy-oriented solution to the dilemmas raised in this article might involve (additional) self-regulation on the part of humanitarian organizations, an effort to respond to the counter-terrorism requirements by demonstrating the capacity and willingness of humanitarian organizations to regulate their own engagements with NSAGs with an eye to limiting any benefits that might reach listed groups. Some organizations have reacted negatively to suggestions of 'enhanced' due diligence and self-regulation, or other attempts by the humanitarian community to impose collective limitations on its engagements with NSAGs. Large humanitarian NGOs and UN agencies may be willing to accept increasingly stringent restrictions on their engagements from specific donors or host states (for example, the USAID regulations discussed above, or the requirements placed on NGOs by host states such as Pakistan, Sudan, or Sri Lanka). Such arrangements might be preferable to a wholesale standardization of the regulations concerning humanitarian engagement with NSAGs, including the establishment of professional standards and accountability procedures that would expose sensitive information to external scrutiny.

'Opting out'

Humanitarian organizations might also conclude that neither the development of new norms nor the promulgation of system-wide standards is plausible in light of political or other limitations. For those organizations that base their reputation, their capacity to negotiate with NSAGs, and their relationship with beneficiaries on their commitment to humanitarian principles, the counter-terrorism-related laws and regulations discussed above might be perceived as particularly damaging and as posing too high a risk. These organizations might choose to 'opt out' of emergency humanitarian operations that fall within the web of counter-terrorism laws: namely, those humanitarian engagements that involve the negotiation and delivery of

life-saving goods and services to territories under the control of listed NSAGs. Such organizations might remain in countries experiencing internal conflict but refrain from any operations that would put them into contact with such groups. While recognizing that this would result in reduced services to populations under the control of listed groups, these humanitarian organizations may nonetheless choose 'opting out' of engagement with listed NSAGs as a lesser-of-two-evils approach to their work on the ground.

Staying below the radar

Another potential response from the humanitarian community might be to attempt to avoid detection by counter-terrorism agencies. While recognizing the applicability of criminal statutes and restrictive donor regulations to their operations, these organizations might try to obfuscate their engagement with NSAGs (for example, by renting cars from private companies rather than paying taxes to listed NSAGs, or by disguising technical trainings as informal meetings with the community). Other organizations might simply not disclose information about interactions with listed NSAGs to donors and authorities, or even between field offices and headquarters, in violation of applicable laws and donor agreements. Such 'don't ask, don't tell' approaches might be quietly accepted or even encouraged by donor representatives who attempt to maintain plausible deniability regarding the specific relationship between their grantees and listed NSAGs, thereby helping to ensure that substantial humanitarian aid funding is still able to be delivered in targeted areas where NSAGs operate. This approach might extend status quo engagements for the short term but can create significant future liabilities. Unlike 'opting out', the 'staying below the radar' response may maintain the primary humanitarian imperative while undermining other core professional principles in terms of transparency, accountability, and co-ordination. Such an approach may invite increased interference from NSAGs, who may be able to exert additional influence on the conditions of humanitarian assistance when they are aware that organizations are seeking to operate in a less-than-transparent manner.

'Opting in'

A final approach that some within the humanitarian community might consider in light of the risks discussed here constitutes 'opting in' to integrated models of relief and protection activities, under the leadership of political and security actors. While humanitarian organizations might thereby lose significant independence and autonomy in their prospective engagements with listed NSAGs, this approach might allow for more overall space for interacting with NSAGs (albeit in a far more constrained and monitored context), as well as increased scope for delivery of goods and services. In such a model, even states with very restrictive material-support laws might choose to permit otherwise unlawful engagements and activities benefiting listed groups, determining that the oversight and scrutiny of the work of humanitarian organizations can allow for some support to fall into the hands of

listed NSAGs. Especially for a government that maintains substantial aid budgets while also promulgating stringent material-support laws, integrating humanitarian organizations into political and security schemes might be an appealing way of maintaining both support for vulnerable populations and the government's international reputation as a donor state. Under this model, states would probably permit a small group of 'vetted' humanitarian organizations to carry out assistance operations, including engagement with listed NSAGs, perhaps relying on the most elite and long-standing organizations to carry out the bulk of approved projects. For humanitarian organizations, this approach would have the benefit of minimizing legal liabilities and unpredictability, as well as allowing the maintenance of some engagements with listed NSAGs, but at the cost of being subject to political and security decisions beyond their control regarding the scope and operational independence of their work in specific conflict situations. In addition, NSAGs and beneficiaries might increasingly call into question the independence and neutrality of humanitarian organizations that 'opt in' to donor states' security schemes in these ways.

Questions about this approach may be seen in the current heated debate within the humanitarian establishment regarding how to understand the potential carve-out of exemptions and licensing schemes.⁷⁸ Some within the humanitarian community see it as the best and safest short-term strategy to minimize liability and risk, and to indicate to donors that they take seriously the threat of misappropriation of funds to terrorist entities. Others worry that the introduction of these schemes into humanitarian negotiations will create a two-tiered system – operations for which exemptions are granted and operations for which exemptions are not granted (regardless of the underlying IHL and international normative frameworks but with significant potential consequences in terms of domestic legal liability).

Conclusion

In many ways, the web of laws and policies discussed in this article seems paralysing for humanitarian actors: an impossible regulatory framework in which success or compliance in one arena is likely to raise risks and liabilities in another. Nonetheless, billions of dollars of humanitarian funding continue to flow to humanitarian organizations, nearly all of which have operations in countries where listed NSAGs control or operate from part of the territory. States continue to uphold principles of humanitarian access and assistance in the UN Security Council, the General Assembly, and other forums. And donors continue to encourage humanitarian organizations to act in a transparent, accountable manner. As such, it is unlikely that humanitarianism, as a professional field and as a set of legal and normative

78 These are frameworks that allow humanitarian organizations to apply for discrete, context-specific exemptions to criminal or regulatory laws in order to carry out operations in areas where listed groups control territory, or where there is a high likelihood of having to engage with listed NSAGs.

principles, will disappear under the weight of the counter-terrorism agenda. Yet the contradictions described here will almost certainly have a significant impact over time on the development of humanitarian practices and policies. The balancing of these contradictory norms will require expanded negotiation skills and a thorough legal understanding on the part of humanitarian professionals, both at the stage of planning operations at headquarters and at the stage of implementing programmes in the field.